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No. 603.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

MOUNTAIN STATES SECURITIES CORPORATION et al.,
Petitioners,

v.

PERRY O. HOOPER, as Trustee in Bankruptcy of
CONSOLIDATED AMERICAN INDUSTRIES, INC.,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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Statute Cited.

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REPLY BRIEF ON BEHALF OF PETITIONERS.

The petitioners address this brief to an issue which has been raised by respondent in his brief but which was not passed on by the court below and is not before this Court on petition for writ of certiorari.

I.

The Jurisdictional Question.

All parties are agreed that in the case at bar, in order to support jurisdiction under § 27 of the Securities Exchange Act, 15 U. S. C. § 78aa, there must be a showing of

either a purchase or a sale of securities. The court below held that there was a sale of securities by the bankrupt corporation. The petitioners contend that this holding was erroneous; the respondent, that it was correct. The respondent now further argues[1] that even if there was no sale of securities by the bankrupt corporation, there was a purchase of securities by it. This latter argument, which was not passed on by the court below,[2] is without legal or factual substance.

First: The complaint shows that the assets of Mid-Atlantic were not "securities" within the meaning of §§ 33 (a) (14) and 10 (b) of the Securities Exchange Act, 15 U. S. C. § 78c (a) (14), 78j (b).

Second: Although the complaint alleges in general terms that the original conspiracy was for the purpose of obtaining the shares of the bankrupt corporation in exchange for the assets of Mid-Atlantic Development Company (R. 9), the complaint specifically alleges that the 700,000 shares were obtained without the contemporaneous or prior transfer to the corporation of the Mid-Atlantic assets (R. 10-14). Further, the complaint fails to allege that these assets were *ever* transferred to the corporation. Nor is there any allegation that the corporation ever received any offer of the assets. On the contrary, the complaint alleges that Ben Jack Cage represented to the corporation that it already owned these assets (R. 9, 10).

Third: Even if the assets of Mid-Atlantic had been securities and had in fact been unilaterally transferred to the bankrupt corporation, such transfer would not have constituted a "purchase" by the corporation. According to the complaint, the entire transaction took place without

[1] Brief of Respondent, p. 6.

[2] Opinion of the Court of Appeals, as set forth in the Petition, p. 28.

the participation, knowledge or authority of the corporation. One can be a grantee, devisee, assignee, or donee without any act on his part, but one cannot be a purchaser without taking some action. Nor can one be a seller without performing some act of sale. The act of the corporation's independent transfer agent in physically delivering the stock certificate was not an act of purchase or of sale.

II.

The Venue Question.

When the argument that there was a purchase of securities falls, it carries with it the argument that a relevant act took place in Alabama. Under the allegations of the complaint the critical event—that is, the event upon which respondent bases his claim of injury—was the delivery of the stock certificate by the bankrupt corporation's transfer agent. It is obvious that such delivery did not constitute a purchase by the corporation. Nor did it constitute a sale. But even if—as held by the court below—such delivery had constituted a sale, in order to support venue in Alabama the complaint would have had to show some act in Alabama connected with such sale. This the complaint failed to do.

The only act alleged to have occurred in Alabama was a misrepresentation made by Ben Jack Cage to obtain $10,000 so that he could purchase *for himself* and his alleged conspirators assets which later became part of the so-called Mid-Atlantic assets. Whatever may be the proper remedy for the recovery of this $10,000, whether under the Securities Exchange Act or otherwise, it is clear that this was a separate wrong. Neither the existence or non-existence, value or lack of value, nor transfer or failure to transfer these assets had any connection with the delivery of the stock certificate by the corporation's transfer

agent. This delivery, according to the complaint, was made in reliance upon fictitious corporate resolutions, not in contemplation of or in connection with the Mid-Atlantic assets.

Respectfully submitted,

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Proof of Service.

I, Jos. F. Johnston, one of the attorneys for Mountain States Securities Corporation, Bruce Kistler, G. Harold Pearson, Ivor C. Peterson, Hoch Reid and Francis J. Knoll, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that

on the ..... day of February, 1961, I served copies of the above and foregoing Reply Brief as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Securities Exchange Commission, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Walter P. North, its general counsel, at the offices of the Commission, Washington 25, D. C.

3. On Perry O. Hooper, as trustee in bankruptcy of Consolidated American Industries, Inc., by mailing a copy in a duly addressed envelope, with first class postage prepaid, to his attorney of record, Truman M. Hobbs, Esq., Godbold, Hobbs & Copeland, 300 Professional Center, Montgomery, Alabama.

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